2011 WL 11056974 (Ky.App.) (Appellate Brief)
Court of Appeals of Kentucky.

Geneva KING, Appellant,
v.
BUTLER REST HOME, INC. d/b/a River Valley Nursing Home,
and
COMMONWEALTH OF KENTUCKY, Kentucky Cabinet for Health and Family Services, Appellees.

No. 2010-CA-001467-MR.
February 8, 2011.

Appeal from Franklin Circuit Court Division II Action No. 10-CI-000193
Hon. Thomas Wingate, Judge

Brief of Appellee, Butler Rest Home, Inc. d/b/a River Valley Nursing Home

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***1 COUNTERSTATEMENT OF THE CASE**

The Appellant's Statement of the Case requires the following additions and clarifications.

The Appellant, Geneva King (hereinafter “King”) has various medical conditions, including cerebrovascular accident, cataracts and depression. (RA 47, Appendix 1).

King states at page 11 of her brief that the document admitting her to River Valley was unsigned and refers the court to item 6 of the Appendix to her brief. That item is only a portion of the documentation prepared in connection with King's admission to River Valley. Included as Appendix 2 to this brief is a full copy of the **financial** documentation created upon King's admission to River Valley. (RA 142, 147-154) The first page of Appendix 2 (RA 142) is entitled “River Valley **Financial** Agreement.” It is signed as Trustee by King's daughter, trustee and attorney in fact, Diana Livengood, and contains the specific statement, in bold lettering:

If Medicaid is denied full payment is due upon date of denial.

(RA 142)

The remainder of River Valley Appendix 2 is entitled “River Valley Nursing Home Admission and **Financial** Agreement” (RA 147-154) and the name “Diana Livengood,” written at the beginning of the document, seems to be in the same hand as is found on the “River Valley **Financial** Agreement.” (RA 142) There is no indication in the record that King ever complained that she was not receiving the services described in the foregoing **financial** documents. III (B) of the “River Valley Nursing Home Admission and **Financial** Agreement” provides, in bold lettering:

***2 If Medicaid benefits are denied to Resident or are discontinued, full payment on Resident's account is due upon the date of denial.**

(RA 149)

King's application for Medicaid benefits was denied on November 18, 2009, following which an invoice for services was sent to Ms. Livengood. (RA 59) While the billing to King on January 1, 2010 was for $41,683.55, counsel for River Valley can represent to the Court that the sum owed by King presently is much greater now. No payment toward the amount owed by King has been made and neither King, nor her attorney in fact, nor her trustee have made any payment arrangements with River Valley to discharge her obligation. (RA 60)

At page 11 of her brief, King states that the definition of "resident" under 900 KAR 2: 050 §1 (3) was never discussed or briefed before her motion to Alter, Vacate or Amend was filed. If that is true, she has failed to preserve this issue for appeal. The implications, that she did not have an opportunity to argue the definition of "resident" or that the Franklin Circuit Court did not have the benefit of her analysis before issuance of the July 19, 2010 Opinion and Order (RA 217-226), are unfounded. First, King clearly questioned the sufficiency of service of the notice on her daughter and attorney-in-fact before the Hearing Officer. (RA 64) Second, the contention that the notice could only be served on King as "resident" was plainly raised in paragraphs 9 through 12 of her Verified Petition in the Franklin Circuit Court. (RA 3-5) Third, King's Reply Memorandum, served on April 22, 2010, specifically disputed the Cabinet's assertion that either the resident or the resident's legal representative could be given the notice of ***3** discharge. (RA 212) So King has had plenty of opportunity to discuss this issue.

But most pertinent, in regard to King's claim that she should have been given the notice of discharge, River Valley Appendix 2 contains the direction that "ALL BILLING STATEMENTS and other correspondence shall be mailed to" Diana Livengood. (RA 154)

Finally, the assertion at pages 8-9 of King's brief, that Mr. Klein testified that King's appeal was not final, is an overstatement. Mr. Klein protested that he was not competent to render such an opinion. (Hearing Transcript, Counter No. 1:29-38) In any event, the date of an appeal hearing stated in King's brief (February 2010) would seem to make this issue moot.

ARGUMENT

I. NEITHER THE FRANKLIN CIRCUIT COURT NOR THE CABINET HAVE VIOLATED REGULATIONS AND 900 KAR 2:050 § (3) IS NOT UNCONSTITUTIONAL.

A. The Franklin Circuit Court applied the proper standard of review of the findings and conclusions of the Hearing Officer.

Conspicuous by its absence from King's citations of authority is KRS 13B.150, which provides:
1) Review of a final order shall be conducted by the court without a jury and shall be confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter. The court, upon request, may hear oral argument and receive written briefs.

(2) *The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.* The court may affirm the final order or it may reverse ***4** the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Without support of substantial evidence on the whole record;

(d) Arbitrary, capricious, or characterized by **abuse** of discretion;

(e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;

(f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or

(g) Deficient as otherwise provided by law. [Emphasis added]

Kentucky courts have, on many occasions, considered the limitations placed upon their powers of review of administrative decisions found in KRS 13B.150. Judicial review of an administrative decision is limited to a determination of whether the agency acted within the constraints of its statutory powers, whether the agency's procedures afforded procedural due process, and whether the agency's decision is supported by substantial evidence of record.

The standard of review for evaluating the circuit court's decision to uphold the ruling by the Cabinet is whether there is substantial evidence in the record to support the findings by the Hearing Officer. If there is substantial evidence to support the findings, they will be upheld, even though there may be conflicting evidence in the record. *Kentucky Commission on Human Rights v. Fraser,* 625 S.W.2d 852, 856 (Ky.1981); *Urella v. Kentucky Bd. of Med. Licensure, 939 S.W.2d 869, 873 (Ky. 1997)* The fact that an appellate court may not have come to the same conclusion regarding the same findings of fact does not warrant substitution of that court's discretion for that of an administrative ***5** agency. *Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.,* 91 S.W.3d 575, 582 (Ky.2002). As fact-finder, the Hearing Officer was afforded great latitude in her evaluation of the evidence heard and the credibility of the witnesses appearing before her. *Kentucky State Racing Commission v. Fuller,* 481 S.W.2d 298, 308 (Ky. 1972).

A court is not to substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. If the Court concludes that the agency applied the correct rule of law to the facts supported by substantial evidence, the final order of the agency must be affirmed. *Bowling v. Natural Res. and Envtl. Prot. Cabinet,* 891 S.W.2d 406, 410 (Ky.App.1994); *lles v. Com.,* 320 S.W.3d 107, 111 (Ky.App. 2010) *Bowling* held, at 409:
"On factual issues[ ], a circuit court in reviewing the agency's decision is confined to the record of proceedings held before the administrative body and is bound by the administrative decision if it is supported by substantial evidence." [Citation omitted] "If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained." [Citation omitted] Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. [Citations omitted]

In weighing the substantiality of the evidence supporting an agency's decision, a reviewing court must hold fast to the guiding principle that the trier of facts is afforded [410] great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it. [Citation omitted]

These same principles are applicable to the review by this Court of the Franklin ***6** Circuit Court's judgment. As the Kentucky Supreme Court stated In *Kentucky Unemployment Ins. Comm 'n v. Landmark Cmty. Newspapers of Kentucky, Inc., supra,* at 581-82:

> In our opinion, the Court of Appeals incorrectly decided to substitute its own judgment for that of the Commission and the Franklin Circuit Court. This was error. The fact that a reviewing court may not have come to the same conclusion regarding the same findings of fact does not warrant substitution of a court's discretion for that of an administrative agency. *See Federal Communications Comm'n v. WOKO, Inc.,* 329 U.S. 223, 67 S.Ct. 213, 91 L.Ed. 204 (1946). We do not mean to say that the Court of Appeals is without

> power to correct an erroneous administrative decision. Rather, we hold that a reviewing court, whether it be one of the circuit courts, the Court of Appeals, or this body, should refrain from reversing or overturning an administrative agency's decision simply because it does not agree with the agency's wisdom. *See Radio Corp. of America v. United States*, 341 U.S. 412, 71 S.Ct. 806,95 LEd. 1062 (1951).

It was with the foregoing principles in mind that the Franklin Circuit Court rightfully affirmed the Hearing Officer's Findings and Conclusions.

B. The Franklin Circuit Court correctly affirmed the conclusion by the Hearing Officer that the notice of discharge was proper.

King claims that she was not given proper notice of discharge for failure to pay her bill, on the grounds that her daughter and attorney in fact was given the Notice, as opposed to it being handed to her in her hospital bed. In her brief at page 14, King makes reference to "ffurther **abuse**" of Kentucky's **elderly** citizens, implying that she has somehow been **abused** by not being handed the notice herself, despite her physical and mental conditions for which she is in the nursing home. King should be careful in ***7** protesting so much about **abuse** of patients; the dark underside of her argument is that, taken to its logical extreme, the only legal manner of giving notice of discharge to a coma patient would be by placing a notice on the chest of the patient. King cannot argue that she never received notice of any kind or in any manner; otherwise, she would not have known to file her appeal with the Cabinet.

King attempts to avoid the clear direction in the admission documents that Ms. Livingood was to receive "all billing statements and other correspondence" (RA 154) by arguing that the admission agreement was unsigned. While it is true that no signature appears at the very end of the **financial** documents, her daughter's signature as responsible party is found on the very first page of the **financial** agreement and her signature also appears to have been put on the second page. (RA 142, 147) There does not seem to be any legal requirement that a contract such as this be signed only at its end.

> At common law and in the absence of a statute prescribing a requirement to the contrary, the "signing" of any writing which the law required to be so evidenced need not be at the end, bottom, or close of the paper, but the signature to be effective may be placed either at the bottom, top, middle, side, or margin of the paper by the one whose duty it was to sign it, and, if so written with the intention that the written name should perform the legal requirement of a signature, the writing would be deemed as legally and properly signed. In other words, at common law the precise place on the writing where the signature was made was neither material nor essential. *Terrell v. Commonwealth*, 194 Ky. 608, 240 S.W. 81, 83 (1922)

Furthermore, King ignores the fact that she accepted the services provided pursuant to the admission documents for many months, and ignores the fact that she initially paid for those same services. King is estopped from making any argument based ***8** upon any supposed lack of signature on the documents of admission. In any event, the Circuit Court handily dealt with this contention by noting:

> Petitioner also argues that the Hearing Officer's finding that a certain contract between the petitioner and River Valley was signed by Diana Livengood was in error and, therefore, arbitrary and capricious. To the extent that this was error, it was harmless, as the contract only affected only the rights between the parties, and not the issue of whether River Valley was in compliance with the applicable state and federal regulations. (RA 224, fn.1)

As to King's substantive argument, River Valley cannot phrase its response any better than the Court below did, when it held:

> Petitioner argues that the Final Order was arbitrary and capricious, and an **abuse** of discretion, because the Cabinet found that River Valley properly gave notice of the involuntary discharge to the Resident, Mrs. King, in accordance with 900 KAR 2:050 § 2(4)(a). This regulation requires that a facility must notify the resident and, if known, a family member or legal representative of the resident, in writing, of the discharge. Petitioner alleges that, because River Valley only sent the notice of discharge to Diana Livengood, and did not notify petitioner herself, the notice did not comply with the regulation. 900 KAR 2:050 §1 (3), however, defines "resident" for the purposes of the regulation as a resident of a facility *or any legal representative or individual acting on behalf of the resident.* Thus, when River Valley notified Ms. Livengood, Petitioner's daughter and legal representative, of the discharge, it simultaneously notified Petitioner, Petitioner's family member, and Petitioner's legal representative. Substantial evidence in the record supports the Cabinet's finding on this point. (RA 224)

C. 900 KAR 2:050 §1(3) is not unconstitutional.

King argues that the Cabinet and the Franklin Circuit Court have unconstitutionally determined that the service of the notice of discharge was proper, but ***9** her argument is untenable.

King does not provide in her brief "a statement with reference to the record showing whether the issue [of constitutionality] was properly preserved for review and, if so, in what manner." CR 76.12(4)(c)(v). The importance of this rule is to ensure that "the trial court should first be given the opportunity to rule on questions before they are available for appellate review." [Citation omitted.] *Southside Real Estate Developers, Inc. v. Pike County Fiscal Court,* 294 S.W.3d 453, 457 (Ky. Ct. App. 2009) As noted above, her claim that the issue was not raised means that she did not preserve this issue for appeal. But even assuming this requirement is overlooked, King fails to provide any legal authority that would support her argument.

King is apparently asserting federal preemption by contending that 42 CFR §483.12 (a) (4) (i), mandates direct, personal physical delivery of the notice of discharge to the resident, and preempts the definition of "resident" found in 900 KAR 2:050 §1(3) [defining "resident" for the purposes of the regulation as a resident of a facility *or any legal representative or individual acting on behalf of the resident.*] 900 KAR 2:050 §1(3) is consistent with KRS 216.515(4), which provides:

> (4) The resident shall be transferred or discharged only for medical reasons, or his own welfare, or that of the other residents, or for nonpayment, except where prohibited by law or administrative regulation. Reasonable notice of such action shall be given to the resident and the responsible party or his responsible family member or his guardian.

In *Southside, supra,* the court noted at 458 that "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons-either ***10** that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' [Citations omitted.]

While federal law may take precedence over state laws in certain instances, "intrusions into the traditional powers of the states are not favored and, therefore, there is a presumption against preemption of state statutes and regulations." *Niehoff v. Surgidev Corporation,* 950 S.W.2d 816, 821 (Ky.1997). The essential inquiry when deciding whether a statute is preempted by a federal statute or regulation is whether the state and federal law can coexist and be applied without conflict. *Hous. Auth. of Covington v. Turner,* 295 S.W.3d 123, 126-27 (Ky. Ct. App. 2009), reh'g denied (July 23, 2009)

The preemption "doctrine does not and could not in our federal system withdraw from the States ... the 'power to regulate where the activity regulated [is] a merely peripheral concern' [of] a federal law." [Citations omitted.] Southside, supra, at 459.

Applying the foregoing principles, King's argument must be rejected. First, she fails to draw the attention of the Court to any provision in 42 CFR §483.12 (a) (4) whereby the term "resident" is defined, while 900 KAR 2:050 § (3) and KRS 216.515(4) very specifically include legal representatives acting on behalf of the resident within the definition of "resident." Thus, *there is no Medicaid regulation that defines "resident,"* such that it actually conflicts with the definition in the Kentucky regulations. Second, the delivery of a notice of discharge to an authorized (and in this case, a specifically designated) representative of the resident is a "merely peripheral concer". The absence of any definition of resident in the federal regulations means there is no conflict. This is especially true where King never claims that her representative did not get the notice" ***11** Federal regulations without doubt intended that some appropriate person be notified of the notice of discharge, but when those regulations do not specifically define "resident", there is no conflict with the Kentucky regulation and statute, which simply explicate the meaning of the term.

II. THE FRANKLIN CIRCUIT COURT CORRECTLY DETERMINED THAT A PATIENT, DENIED MEDICAID BENEFITS, CANNOT CONTINUE TO RESIDE IN A NURSING HOME WITHOUT PAYMENT, PENDING MULTIPLE APPEALS OF THE DENIAL AND IT IS NOT SUFFICIENT FOR THE PATIENT TO HAVE SIMPLY SUBMITTED "PAPERWORK".

King argued below, and argues now, that a resident of a nursing home cannot be discharged for nonpayment, no matter how much is owed the nursing home, until the resident finally decides to stop appealing denials of Medicaid benefits. Neither the Hearing Officer nor the Circuit Court accepted that argument.

Is King saying that until the Supreme Court of the United States declines to grant certiorari, or finally decides her case, King gets to remain at River Valley without any payment? And that if King loses her appeals, River Valley also loses, because King is claiming that all her assets were placed in a trust, under which she is entitled to nothing more than the income from the trust? As the Franklin Circuit Court said in its opinion, "Petitioner is attempting to impose a requirement of "finality" where there is not one in the applicable regulations." (RA 222)

Again, the Circuit Court more than adequately explained its ruling, holding:
The state regulations merely require that a facility may not discharge a resident for non-payment unless the resident has failed, after reasonable and appropriate notice, to pay for, or to have Medicaid pay for, her stay. 900 KAR 2:050 §2(1)(e).

12** The Cabinet found that Petitioner was unable to provide any authority that states that a facility must house a resident without payment while a Medicaid appeal is pending. The Court agrees. Petitioner has failed to have Medicaid pay for her stay. Medicaid has denied two applications, and Petitioner has, in the meantime, failed to make payments or to offer a reasonable payment plan. A reviewing court gives great deference to an agency's interpretation of its own regulations. [Citation omitted] The Cabinet's determination that the applicable state regulations do not require that Petitioner complete the appeals process before she is discharged for nonpayment was reasonable. (RA 222)

With respect to the federal guidelines, the Court also finds that there is no requirement of "finality" as argued by Petitioner. The State Operations Manual mandates that a facility cannot discharge a resident for non-payment if the resident has submitted all necessary paperwork for Medicaid to pay the bill. State Operations Manual Appendix PP at §483.12 (a). This is not, however, a simple matter where a resident has filed an application and is awaiting a determination. Here, Petitioner has filed two applications, and both have been denied by Medicaid. A resident may not stave off involuntary discharge for nonpayment merely by continuing to file paperwork. Moreover, the term "paperwork" cannot be extended to include the filings involved in subsequent appeals. Otherwise, the process could continue indefinitely while Petitioner refuses to make any payments or to offer a reasonable payment plan. (RA 222-223)

Further, we agree with the Cabinet that Petitioner has provided no authority that supports her position that a Medicaid claim has not been "denied" until the appeals process has been exhausted, or that a failure to find otherwise is a violation of her due

process rights. (RA 223) *** Thus, we uphold the Cabinet's finding that a facility need not house a resident without payment while a Medicaid denial is being appealed. (RA 224)

***13 III. THE FRANKLIN CIRCUIT COURT CORRECTLY DETERMINED THAT RIVER VALLEY PROVIDED PROPER PREPARATION AND ORIENTATION FOR KING'S DISCHARGE.**

The notice of discharge specified that King would be discharged to Diana Livengood's home. King complains that it was not properly determined that the home was suitable before the notice of discharge was given, and complains that she was not properly oriented pursuant to the State Operations Manual. However, the Circuit Court disposed of this complaint by holding:

> 900 KAR 2:050 §2 (5) requires that the written notice of discharge include the location to which the resident is transferred or discharged. Petitioner alleges that a facility cannot name a location in the discharge letter without having already taken the steps in 900 KAR 2:050 §2 (6) to determine whether the location is appropriate and without providing sufficient preparation and orientation to the resident pursuant to the State Operations Manual. The requirements governing the contents of the notice of discharge letter, however, are found in §2 (5); the steps in §2 (6) and the State Operations Manual guidelines are separate requirements governing the discharge procedure itself. The testimony at the administrative hearing indicates that River Valley's normal procedure involved determining the appropriateness of a location and preparing and orienting the resident within a week of the actual transfer. The Court can find no error in the Cabinet's determination that River Valley's notice of discharge was not defective.

CONCLUSION

The notice of discharge for non-payment was proper in all respects. The Hearing Officer deemed it proper in all respects. The Franklin Circuit Court found no legal authority supporting King's arguments and found no reason to disregard the decision by ***14** the Cabinet. River Valley respectfully submits that this Court, applying the legal standards described above, should affirm the judgment of the Franklin Circuit Court.

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